

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

IN RE:

In Proceedings
Under Chapter 7

JIM L. DEAN,

Case No. 00-42007

Debtor(s).

DEBORAH MICHELLE DEAN,

Plaintiff(s),

Adv. No. 01-4010

v.

JIM L. DEAN,

Defendant(s).

OPINION

This matter is before the Court on the motion of the debtor-defendant for summary judgment on a complaint filed by his former spouse to determine the dischargeability of marital debts under 11 U.S.C. § 523(a)(15). The debtor asserts that in an agreement signed by both parties and incorporated into their dissolution judgment, the parties stipulated that marital debts of the kind specified in § 523(a)(15) would be dischargeable in bankruptcy. For this reason, the defendant asserts, no factual issue remains concerning the dischargeability of debts under § 523(a)(15), and summary judgment should enter in his favor on the plaintiff's complaint.

The language referred to by the debtor is found in Article

Six of the parties' agreement. Following a listing of each spouse's respective "debts and liabilities" in the first two paragraphs, paragraph 3 provides:

Except as otherwise set forth in this order, each party shall bear sole responsibility for any and all debts and liabilities each party respectively has incurred, and unless discharged in bankruptcy the party incurring these debts shall indemnify and hold the other party harmless with respect thereto.

See Judg. of Diss., Ex. 1 of Pltff.'s Complt., filed Jan. 26, 2001, Art. 6, Par. 3 (emphasis added). Paragraph 4 further states:

The parties agree that the debts allocated herein will be subject to discharge in bankruptcy if either party files a petition.

Judg. of Diss., Art. 6, Par. 4.

Contrary to the debtor's assertion, the language cited above does not state that the debts allocated to each party will be discharged in bankruptcy, but only that they will be "subject to" discharge. This language, therefore, merely sets forth the parties' rights under § 523(a)(15) of the Bankruptcy Code -- the right to seek a discharge of marital property debts and, if the requirements of that section are met, obtain a discharge of such debts.

Section 523(a)(15) allows a debtor to discharge non-support obligations incurred in the course of a divorce if

(A) the debtor does not have the ability to pay such

debt . . . ; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15)(A), (B). By its terms, this section provides "an exception to the exception" from discharge for marital debts. Thus, while a debtor is prohibited from discharging debts in the nature of support, see 11 U.S.C. § 523(a)(5), a debtor may, if he or she meets the requirements of § 523(a)(15), obtain a discharge of debts that are in the nature of property division. These debts are "subject to discharge" under § 523(a)(15) and will, if the debtor obtains a discharge under § 727,¹ be automatically discharged unless, "on request of the creditor to whom such debt is owed," the court determines such debt to be excepted from discharge [under § 523(a)(15)]." 11 U.S.C. § 523(c)(1).

In this case, while the language of the parties' agreement acknowledges that either party may seek to discharge the debts allocated between them, it does not prohibit either spouse from challenging such discharge and seeking a determination of whether, under § 523(a)(15), the requirements for discharge of

¹ Under § 727(b), a discharge in a Chapter 7 case discharges the debtor of all prepetition debts, "except as provided in section 523 of this title." 11 U.S.C. § 727(b).

marital property debts are met.² The plaintiff herein has filed a timely complaint asserting that the debtor has the "ability to pay" the debts in question, see 11 U.S.C. § 523(a)(15)(A), and that discharging these debts would result in a benefit to the debtor that outweighs the detrimental consequences to the debtor. See 11 U.S.C. § 523(a)(15)(B). These are factual issues that are not foreclosed from judicial determination by the language of the parties' agreement. For this reason, summary judgment is inappropriate at this time, and the debtor's motion will be denied.

SEE WRITTEN ORDER.

ENTERED: March 22, 2001

/s/ KENNETH J. MEYERS
UNITED STATES BANKRUPTCY JUDGE

² The Court notes that if the parties' agreement had contained language prohibiting a challenge to dischargeability under § 523(a)(15), it would be void as against public policy in the same way as language prohibiting a party from seeking a discharge in bankruptcy has been found to be void as against public policy. See Klingman v. Levinson, 58 B.R. 831, 836-37 (Bankr. N.D. Ill. 1996), aff'd, 66 B.R. 548 (N.D. Ill. 1986), aff'd, 831 F.2d 1292, 1296 n. 3 (7th Cir. 1987); see also In re Paneras, 195 B.R. 395, 403 (Bankr. N.D. Ill. 1996). A party in a divorce proceeding should not be allowed to contract away his or her right to a determination of the parties' relative financial circumstances under § 523(a)(15)(A) and (B) if, at a later time, the other party seeks to discharge debts which he or she has promised to pay.

